NO. 83-1245

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT L. WILHELM,

Petitioner,

vs.

CONTINENTAL TITLE COMPANY, ANGELO J. VISCONTI, and DOROTHY J. PORTER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Angelo J. Visconti

QUESTION PRESENTED FOR REVIEW

Respondents disagree with the statement of questions presented for review by the Petitioner and submit that the question posed by this appeal is properly characterized as follows:

1. Whether the Tenth Circuit Court of Appeals erred in ruling that handicapped persons do not constitute a class included within the scope of 42 U.S.C. §1985(3).

Respondents submit that Petitioner's statement of questions presented for review is inaccurate in that question number 2 raises settled matters already decided by this Court, as more fully addressed below. Issue number 3 presented by Petitioner was not raised in timely fashion below and consideration here is improper, and further, was not the basis of decision by the Tenth Circuit. Accordingly, Petitioner's issue number 3 is not properly presented to this Court, as more fully addressed below.

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OPINIONS BELOW

An oral opinion was issued by the United States District Court for the District of Colorado on May 17, 1982 (See Appendix to Petition for Writ of Certiorari, pp. A-24 to A-56).

The opinion issued by the United States Court of Appeals for the Tenth Circuit was rendered on November 7, 1983, and is officially reported as follows:

Wilhelm v. Continental Title Company., et al.,

720 F.2d 1173 (10th Cir. 1983)

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DOROTHY J. PORTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Continental Title Company and Angelo J. Visconti, request that the Court deny the Petition of

Robert L. Wilhelm, for a Writ of Certiorari, to be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered November 7, 1983.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents submit their Supplemental Statement of the Case to correct misstatements and omissions in Petitioner's Statement of the Case.

Contrary to Petitioner's Statement of the Case (page 12 of the Petition for Writ of Certiorari) on May 12, 1982, the District Court issued an oral opinion granting Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (see Appendix for Respondent's Motion to Dismiss) and thereby dismissed Petitioner's claims

asserted under 42 U.S.C. §1985 and §1986. There was no suggestion in the District Court Order (see Appendix to Petition for Writ of Certiorari, pp. A-24 to A-56) that it treated the Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted as a Motion for Summary Judgment.

Furthermore, contrary to Petitioner's suggestion that the United States Court of Appeals for the Tenth Circuit erred when it allegedly permitted the District Court to dismiss Plaintiff's claims under 42 U.S.C. §1985 and §1986 by granting Defendants' Motion to Dismiss, the opinion of the Tenth Circuit Court of Appeals (see Appendix to Petition for Writ of Certiorari, pp. A-2 to A-23) makes it abundantly clear

that the appealed issues were before that Court on the dismissal of the cause for failure to state a claim upon which relief can be granted and were examined under the applicable standard.

Finally, as more fully discussed below, the Tenth Circuit's opinion did not hold, contrary to applicable law, that non-racial classes are not entitled to the protection of 42 U.S.C. §1985(3) as asserted by Petitioner in his Statement of the Case.

REASONS FOR DENIAL OF PETITION OF WRIT OF CERTIORARI

I. The Tenth Circuit's decision is in accord with applicable decisions of the United States Supreme Court defining the scope of a proper class under 42 U.S.C. §1985.

The Supreme Court of the United States in United Brotherhood of

Carpenters and Joiners of America, Local 610, AFL-CIO, et al. v. Scott, et al., _____ U.S. _____, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) recently defined the scope of an asserted claim under 42 U.S.C. §1985(3). While not directly holding that handicap is not a "class" within the scope of §1985(3), this Court's opinion contained pronouncements and analysis which are determinative, if not highly persuasive, of that issue. It is submitted that in view of this Court's holding in Scott, the Petition for Writ of Certiorari should be denied and the Tenth Circuit opinion affirmed.

In Scott, this Court reversed the Fifth Circuit Court of Appeals holding that 42 U.S.C. §1985(3) reaches alleged conspiracies motivated by political or economic bias. As the present record

reflects, the Tenth Circuit Court of Appeals held that handicap was not a proper "class" within the ambit of 42 U.S.C. §1985(3).

After initially addressing the issue of whether state action is required in a §1985 claim alleging interference with First Amendment rights, this Court reversed the Fifth Circuit "on the dispositive ground that §1985(3)'s requirement that there must be 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action', Griffin v. Breckenridge, 403 U.S., at 102, was not satisfied in this case." _____ U.S. _____, 103 S.Ct. at 3358, 77 L.Ed.2d at 1057. Specifically, this Court reversed the lower court decisions that §1985 forbids

conspiracies against workers who refuse to join a union. More importantly, this Court refused to affirm the lower court decisions that §1985 reaches conspiracies other than those motivated by racial bias.

In reaching its conclusion, this Court reviewed the historical context of §1985 and its genesis in the Reconstruction era. The Court, in a highly persuasive statement, said:

> In the first place, it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negros and those who championed their cause, most notably Republicans. 103 S.Ct. at 3359, 77 L.Ed.2d at 1059 (Emphasis added).

By this statement, this Court expressed in strong and forceful language the narrow interpretation to be applied to §1985(3) and that such interpretation encompasses only those classes within its historical context. In other words, this Court's opinion in Scott dictates that handicap does not come within the scope of 42 U.S.C. §1985.

In Scott, this Court discussed how union/management relationships are governed in specific detail by the National Labor Relations Act, 29 U.S.C. §151 et seq. This was used as an example of statutorily addressing economic conflicts and relationships. This is consistent with this Court's holding and analysis in Great American Fed. S. & L. Ass'n. v. Novotny, 442 U.S.

366 (1979), wherein the existence of Title VII, 42 U.S.C. §2000(3), et seq, precluded the use of §1985 as a remedy. Scott, further defined the scope of §1985 by stating:

> Economic and commercial conflicts, we think, are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law prescribing injuries to persons and property. ___ U.S. _____, 103 S.Ct. at 3361, 77 L.Ed.2d at 1061.

The leading case on the scope of §1985 is Griffin v. Breckenridge, 403 U.S. 88 (1971). In Griffin, the Court enunciated the requirement of some recognized class-based invidious discriminatory animus which must exist to support the conspiracy. As the Court stated:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animous behind this conspirator's action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. 403 U.S. at 103 (Emphasis added).

A careful review and analysis of the decision below in this proceeding reveals that the Tenth Circuit applied the proper interpretation to a claim asserted under §1985(3), in conformance with Scott and Griffin. After reciting the pertinent factual allegations from the pleadings, the Tenth Circuit opinion discusses at great length this Court's opinion and analysis in Scott, and particularly this Court's comments

pertaining to the historical analysis of §1985 and the Congressional intent relative to that law. The Tenth Circuit opinion stated, in pertinent part, as follows:

> In our above examination of the opinion in United Brotherhood of Carpenters v. Scott, ____ U.S. _____, 51 U.S.L.W. 5173, we described the reference to limiting opinions; the emphasis upon the conditions that gave rise to §1985(3); and more particularly the classes or groups which were then involved in the struggle. The nature of groups so involved, as described in Scott, must influence greatly any analysis of the scope of the act. The adoption of the "limiting amendment" to sort out incidents with no animus or motivation of the kind under consideration is also a dominating factor.
>
> We are concerned with a statute enacted for a particular purpose and to meet particular condi-

tions. The rights and privileges sought to be protected (as contrasted to the "class") are diverse and with the constitutional overtones are to be construed broadly. However, the classes or groups to be protected are instead to be derived from statutory construction. This in our view the Supreme Court has done in Scott and Griffin. From Scott we repeat part of a quotation appearing above. Thus after referring to Griffin and noting that the Court there withheld judgment as to whether §1985(3) "went any farther than its central concern -- combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended affects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking other evidence of congressional intention, we folow the same course here." Thus the Court also withheld judgment, but the significant part of the statement is that the refusal to go farther was placed on the reason -- lacking other evidence of congressional intention.

> This came after the examinations of such history-evidence in Griffin and Scott, as well as prior cases. We must conclude that a class of "handicapped persons" was not in the contemplation of Congress in 1871, and was not included as a class in what is now §1985(3). See Cain v. Archdiocese of Kansas City, Kansas, 508 F.Supp. 1021 (D. Kan.). 720 F.2d at 1177.

Clearly, the Scott decision was carefully followed by the Tenth Circuit in the rendering of its opinion in the instant case. Indeed, this is apparent from the opinion itself when the Tenth Circuit stated:

> In summary as to the Scott opinion, we find nothing therein to give any encouragement whatever to extend §1985 to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned. In fact from Scott we get a

> signal that the classes covered by §1985 should not be extended beyond those already expressly provided by the Court. 720 F.2d at 1176.

Allegations of conspiracy on the basis of handicap are not recognized within the scope of equal protection or equal privileges and immunities as defined by §1985. Allegations of discrimination in employment on the basis of handicap do not create a deprivation of equal enjoyment of those peculiar rights secured by the Constitution to all persons. See, Great American Fed. S. & L. Ass'n. v. Novotny, supra.

On the basis of the foregoing, it is submitted that the opinion below of the Tenth Circuit Court of Appeals is clearly in line with applicable

precedent from this Court. Scott clearly limited the scope of a claim asserted under 42 U.S.C. §1985. The Tenth Circuit's decision is in line with this Court's holdings in Scott and Griffin. Accordingly, no basis exists on which to grant the Petition for Writ of Certiorari, and this Court should deny the Petition.

II. The Tenth Circuit's decision does not conflict with the decision of another federal circuit court of appeals on the same matter.

As a second reason in support of his Petition, the Petitioner asserts that a conflict exists between the decision rendered by the Tenth Circuit below and the decision by the Second Circuit Court of Appeals in People by Abrams v. 11 Cornwell Company, 695 F.2d

34 (2d Cir. 1982) (hereinafter "Abrams"). For the reasons discussed below, it is submitted that no conflict justifying the granting of the Petition exists.

Initially, it should be pointed out that the decision rendered by the Second Circuit Court of Appeals in People by Abrams v. 11 Cornwell Co., supra, was rendered on November 30, 1982, prior to the issuance of this Court's opinion in Scott, supra. As such, it is submitted that the Abrams decision is not truly in conflict with the Tenth Circuit decision below. Clearly, when it issued its opinion, the Second Circuit did not have the benefit of this Court's opinion and reasoning as to the scope and extent of a claim asserted under 42 U.S.C. §1985 as declared in Scott. While the

existence of a conflict between decisions of federal circuit courts of appeal is an important factor in the determination of the granting of a Petition for Writ of Certiorari, it is respectfully submitted that no conflict justifying the granting of the Petition exists here. It is respectfully submitted that this Court's decision in Scott, as followed by the Tenth Circuit in its decision below, clearly defined the applicable scope of a claim under 42 U.S.C. §1985. As such, the Abrams decision is not legitimate authority for the issues presented and no actual conflict exists.

In addition, it is submitted that Abrams is inapplicable on other grounds as a basis for asserting a conflict with the decision below. Specifically, this

Court's attention is directed to fn. 3 of the opinion in Abrams, 695 F.2d at 40-41, which states as follows:

> Judge Pratt found the claim based on the "preventing or hindering" clause of §1985(3) to be substantial. Accordingly, he did not reach the question whether the state's additional claim under §1985(3) that 11 Cornwell conspired to deprive mentally retarded persons as a "person or class of person" of equal protection of the laws was substantial. In light of our holding below agreeing with Judge Pratt that the "preventing or hindering" claim was substantial, we likewise need not reach the substantiality of the additional claim.

In other words, the Abrams opinion is distinguishable from the Tenth Circuit opinion as to the basis of the decision. Abrams was decided upon a different clause of §1985 than the

present case. A careful reading of the Abrams decision will disclose that the Second Circuit Court of Appeals itself declined to hold that mentally retarded persons were a "class" within that portion of §1985 relied upon by Petitioner here. Rather, the Second Circuit limited its holding to the preventing or hindering clause of §1985. As such, there is no legitimately existing conflict between the decision of the Second Circuit in Abrams and the Tenth Circuit in this case. Accordingly, the Petition should be denied.

Another distinguishing factor that illustrates the lack of a "conflict" between the Abrams decision and the Tenth Circuit decision is that the Abrams decision directed itself to a

purported class of "mentally retarded persons". In the instant case, the Tenth Circuit distinguished its holding when it stated as follows:

> We feel compelled by United Brotherhood of Carpenters v. Scott, ____ U.S. ____, 51 U.S.L.W. 5173, and by Griffin v. Breckenridge, 403 U.S. 88, to hold that even if there could be here developed by further pleading a class of handicapped persons with sufficient conditions or factors in common derived from their physical condition to be ascertainable or identifiable, it could not come within the provisions of 42 U.S.C. §1985(3). 722 F.2d at 1176-77. (Emphasis supplied by the court)

In other words, the "class" being addressed by the Tenth Circuit Court of Appeals was limited and distinguishable from the purported "class" addressed by the Second Circuit in Abrams.

Finally, while the existence of a purported conflict between the circuit courts of appeal decisions is a significant factor to be considered in determination of a Petition for Writ of Certiorari, such Petition should be granted only where the conflict is one that needs to be resolved by the Supreme Court. In light of this Court's decision in Scott, Respondents respectfully submit that no recurring conflict on the scope of a claim asserted under 42 U.S.C. §1985 exists to be resolved. For the reasons set forth above, the Petition should be denied.

III. The Tenth Circuit's decision relating to non-racial classes is not erroneous, is not in conflict with decisions of other circuits or its own previous decisions on the same matter.

Petitioner next asserts that the Tenth Circuit Court of Appeals ruled that non-racial classes are not entitled to the protection of 42 U.S.C. §1985(3) and that such is in conflict with other federal appellate court decisions.

Respondents submit that in light of the Scott decision clearly limiting the scope of a claim asserted under 42 U.S.C. §1985(3), that Petitioner's contention is without foundation. A review of the Tenth Circuit's opinion indicates that the Tenth Circuit relied expressly upon Scott, supra, which held that a non-racial class, i.e., non-union groups, are not entitled to the protection of or within the scope of classes contemplated by 42 U.S.C. §1985(3). Accordingly, the Tenth Circuit's decision is in accord with

applicable Supreme Court authority. See also, Griffin v. Breckenridge, supra; and Great American Fed. S. & L. Ass'n. v. Novotny, supra. Essentially, the Tenth Circuit did not make a conflicting decision as asserted by Petitioner.

In support of this purported basis for granting of the Petition, Petitioner relies upon the Fifth Circuit Court of Appeals decision in Scott v. Moore, 680 F.2d 979 (5th Cir. 1982). However, a review of this Court's decision in Scott, will indicate that this Court expressly overturned the Fifth Circuit's decision on the essential issue presented here when it stated:

> Both courts below answered that question; both held that the section not only reaches conspiracies other than those motivated by racial bias but also affords conspiracies

> against workers who refuse to join a union. We disagree with the latter conclusion and do not affirm the former. _____ U.S. _____, 103 S.Ct. 3359, 77 L.Ed.2d 1058.

This Court refused to affirm a holding that non-racial classes are afforded protection by 42 U.S.C. §1985. The significance of this Court's statement is that the protections afforded by 42 U.S.C. §1985 are greatly limited in light of the acts Congressional history. Scott and Novotny have excluded non-racial classes from the scope of §1985, contrary to Petitioner's assertion. The Tenth Circuit followed those decisions. As such, the Tenth Circuit Court of Appeals below did not erroneously rule in conflict with applicable authority from other federal courts on the specific

matter and as such, the Petition should be denied.

Petitioner further asserts that the opinion of the Tenth Circuit Court of Appeals in the instant matter is in conflict with its prior decision in Dry Creek Lodge, Inc. v. United States, 515 F.2d 962 (10th Cir. 1975), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). It is respectfully submitted that such an assertion is without foundation based upon a review of the specific cases. The issue presented to the Tenth Circuit in Dry Creek Lodge was not whether the plaintiffs were within a class recognized within the scope of 42 U.S.C. §1985. The existence or lack of existence of a proper class was not in issue. Rather, the issue presented on

appeal was whether the district court properly dismissed the case on a summary basis. As such, this purported conflict asserted by Petitioner is illusory.

A review of the Tenth Circuit Court of Appeals' opinion in the present matter will reveal that it followed not only applicable authority from this Court but authority previously issued by the Tenth Circuit Court of Appeals. See, Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) and Ward v. St. Anthony's Hosp., 476 F.2d 671 (10th Cir. 1973). Those opinions are consistent with Griffin and this Court's most recent pronouncement in Scott.

IV. There is no important question of federal law which should be settled by this Court.

Rule 17(1)(c), Rules of the Supreme Court of the United States, provide that the rendering of a decision by a federal court of appeals on an "important question of federal law which has not been, but should be, settled by this Court," may be grounds for the granting of a Petition for Writ of Certiorari. In that regard, the critical element is a showing by the Petitioner that the question presented and to be resolved is one of general importance, not just of importance to the Petitioner or to the instant dispute. Respondents respectfully submit that such general importance is lacking in this case and that Petitioner has failed to make the necessary showing.

As previously noted, this Court has passed on the question of the proper

scope of an action asserted under 42 U.S.C. §1985 on numerous occasions. Most notably, this Court has defined and limited the scope of §1985 in Griffin; Novotny, and most recently in Scott. In light of these decisions construing and limiting the scope of §1985, it is respectfully submitted that there is no federal question of general importance requiring decision by this Court.

It is critical to note that Petitioner does not assert under Rule 17(1)(c), Sup. Ct. R. that the decision of the Tenth Circuit Court of Appeals is in conflict with applicable decisions of this Court. Essentially, Petitioner has conceded that the Tenth Circuit's decision is in accord with prior decisions of this Court. It is strenuously submitted that such is a

critical factor to be considered and is grounds for the denial of the Petition.

V. There has been no departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision.

As earlier noted, Petitioner's contention that the District Court treated Respondents' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted as a Motion for Summary Judgment is not an issue properly before this Court because it was not the basis of the Tenth Circuit's decision nor was it raised in a timely fashion below. As such, consideration here is improper. While Petitioner sets forth a lengthy string of citations to support his proposition, a reading of the District Court oral ruling (see

Appendix to Petition for Writ of Certiorari, pp. A-24 through A-56) and the Tenth Circuit's opinion (Appendix to Petition for Writ of Certiorari, pp. A-1 through A-23) will establish that neither court acted in the manner in which Petitioner contends. The Tenth Circuit's opinion noted that the District Court had decided this case as a Motion to Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted under Rule 12, Fed.R. Civ. P. and that the appropriate standard for dismissal and review was applied. Specifically, the Tenth Circuit stated:

> This appeal, as mentioned, reaches us on the dismissal of the §1985 cause for failure to state a claim, and must be examined under the applicable standard. 720 F.2d at 1175.

Clearly, Petitioner's contention that the Courts below erroneously departed from "the accepted and usual course of judicial proceedings. . . as to call for an exercise of this court's power of supervision" under Rule 17(1)(a), Sup. Ct. R. is without foundation and must be rejected.

In addition, Respondents submit that this purported issue presented for review is not properly before the Court in that it was not timely raised below. A review of Petitioner's Brief filed with the Tenth Circuit will reveal that Petitioner at no time asserted that the District Court treated the Motion to Dismiss as a Motion for Summary Judgment. As such, Petitioner's Issue No. 3, having not been raised below nor the basis of the Tenth Circuit's

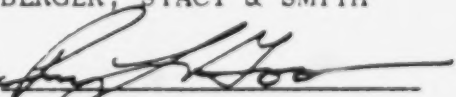
decision is not properly before this Court. Consideration of this contention here as a basis for the granting of the Petition for Writ of Certiorari is improper.

CONCLUSION

WHEREFORE, inasmuch as the Tenth Circuit Court of Appeals decision was a consistent and proper application of federal law, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EIBERGER, STACY & SMITH

By 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of February, 1984, three true and correct copies of the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were mailed, first class postage prepaid and affixed thereto, properly addressed to David L. Smith, Esq., 2036 Dexter Street, Denver, Colorado 80207, counsel for Petitioner, and Mr. Timothy R. Arnold, Assistant Attorney General, State of Colorado, 1525 Sherman Street, Denver, Colorado 80202, counsel for Respondent Dorothy J. Porter. I further certify that all parties required to be served have been served.

Perry L. Goorman

APPENDIX

Respondents incorporate herein by reference as if fully set forth verbatim the Appendix to the Petition for Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 81-F-1845

ROBERT L. WILHELM, Plaintiff, vs. CONTINENTAL TITLE COMPANY,et al., Defendants.	CONSOLIDATED MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR MORE DEFINITE STATEMENT

Defendants Continental Title Company and Angelo J. Visconti, through their attorneys undersigned, submit the following "Consolidated Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted and Motion for More Definite Statement". In support thereof, Defendants show unto the Court as follows:

I. HANDICAP IS NOT A BASIS FOR A CLAIM UNDER §1985 AND §1986

1. This action was commenced on October 20, 1981, by Plaintiff, asserting inter alia, claims for relief under 42 U.S.C. §§ 1985 and 1986. On February 2, 1982, this Court granted Plaintiff leave to file a Second Amended Complaint amending and realleging such asserted claims.

2. An allegation of conspiracy on the basis of handicap or alleged membership in a "class of handicapped persons" is not recognized as a fundamental, constitutionally protected right or basis within the meaning of 42 U.S.C. §1985 and 42 U.S.C. §1986. 42 U.S.C. §1985 and §1986 are remedial statutes enacted to protect those fundamental rights of equal protection within the meaning of the Fourteenth

Amendment to the U.S. Constitution, and those alone.

3. The fundamental rights protected within the meaning of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. §§ 1985 and 1986 are limited to race, national origin, or color. Accordingly, there is no basis for Plaintiff's claim of a conspiracy on the basis of handicap and Plaintiff has therefore failed to state a claim upon which relief can be granted.

II. TWO OR MORE PERSONS REQUIREMENT

1. On or about October 20, 1981, Plaintiff commenced this action asserting claims under 42 U.S.C. §1985 and 42 U.S.C. §1986. On or about February 2, 1982, this Court granted Plaintiff leave to file a Second Amended

Complaint, as appears of record. Pursuant to Court's Order of February 2, 1982, this Motion is submitted.

2. In his Second Amended Complaint, Plaintiff essentially alleges that Defendants Continental Title Company and Angelo J. Visconti, (its President and authorized agent), engaged in a conspiracy with each other. Specifically, Plaintiff alleges that ". . . the Company and Visconti engaged in a conspiracy to discharge Wilhelm from his employment with the company because of his membership of a class of handicapped persons" (¶ 6, Second Amended Complaint).

3. The acts of a single actor do not form the basis of a conspiracy. Jaramillo v. Lahti, _____ F.Supp. _____, Civil Action No. 80-F-

182, (Memorandum Opinion and Order dated July 24, 1981, D. Colo.). As a matter of law, the individual Defendant Angelo J. Visconti and the corporate Defendant, Continental Title Company are incapable of conspiring.

4. Accordingly, Plaintiff has failed to state a claim upon which relief can be granted against both Defendants.

5. In the alternative, Plaintiff has failed to state a claim upon which relief can be granted against Defendant Angelo J. Visconti only, since, as a matter of law, said individual Defendant and the corporate Defendant are incapable of conspiring.

III. LACK OF STATE ACTION

1. Plaintiff commenced this action on October 20, 1981 asserting against Defendants claims under 42 U.S.C. §§ 1985 and 1986 and in addition, apparently asserting a claim for relief against Defendants Continental Title Company and Angelo J. Visconti under 42 U.S.C. §1983 and the Fourteenth Amendment to the U.S. Constitution.

2. As against said Defendants, the Second Amended Complaint is utterly lacking and devoid of any factual allegations or support asserting "state action" by said Defendants as required to state a claim under 42 U.S.C. §§ 1985 and 1986. Further, Plaintiff's Second Amended Complaint is utterly lacking and devoid of any factual support or allegations of actions by Defendants

Continental Title Company and Angelo J. Visconti acting under color of Colorado state law or state action, as required to state a claim under 42 U.S.C. §1983 and the Fourteenth Amendment.

3. Accordingly, Plaintiff's Second Amended Complaint should be dismissed with prejudice for lack of "state action" by Defendants Contiental Title and Visconti.

CONCLUSION

WHEREFORE, for the reasons stated above, and as more fully set forth in a Memorandum Brief filed contemporaneously herewith, Defendants above named move this Court for an order dismissing Plaintiff's Second Amended Complaint with prejudice for failure to state a claim upon which relief can be granted.

MOTION FOR MORE DEFINITE STATEMENT

As an alternative to the foregoing Motions to Dismiss, Defendants Continental Title Company and Angelo J. Visconti, through counsel undersigned, submit the following Motion for More Definite Statement, and in support thereof, show unto the Court as follows:

1. This action was commenced on October 20, 1981, by Plaintiff, asserting claims for relief under 42 U.S.C. §§ 1985 and 1986. On February 2, 1982, this Court granted Plaintiff leave to file a Second Amended Complaint amending and realleging such asserted claims under 42 U.S.C. §§ 1985 and 1986.

2. In Paragraph 6 of the Second Amended Complaint, Plaintiff alleges that Defendants have engaged in a

conspiracy "with each other and with third persons". No other allegations are contained in the Second Amended Complaint relating to the identity of these unnamed "third persons".

3. As an alternative to Defendant's Consolidated Motions to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted, as well as Defendant's other Motions to Dismiss and/or Motion for Summary Judgment, as filed with respect to Plaintiff's claims asserted under 42 U.S.C. §§ 1985 and 1986, Defendants submit that such conclusory pleading without factual basis as contained in the Second Amended Complaint is totally insufficient to state a claim against Defendants. Plaintiff has failed to allege the identity of these "third persons" or the

acts of conspiracy of Defendants with these "third persons". At best Plaintiff has made general conclusory allegations of a conspiracy between Defendants and third persons. These conclusory allegations are totally unsupported by factual permit allegation sufficient to Defendants an opportunity to properly answer or respond.

Defendants should not be required to "guess" as to the allegations of a complaint and should be permitted to know the factual basis and support for Plaintiff's contentions.

As an alternative to Defendant's various Motions to Dismiss, (including but not limited to Failure To State A Claim Upon Which Relief Can Be Granted, Lack Of Subject Matter Jurisdiction, and Motions for Summary Judgment),

Defendants submit that this court should require Plaintiff to submit a More Definite Statement, setting forth with specificity the factual basis for the alleged conspiracy with unnamed third persons. Included in such allegations would be the identity of said persons, the dates when the alleged acts of conspiracy with each of said third persons occurred, the specific acts of conspiracy that formed the basis of the Complaint.

WHEREFORE, as an alternative to Defendant's various Motions to Dismiss and for Summary Judgment, Defendants move this Court for an order directing Plaintiff to submit a More Definite Statement as set forth above.

Dated this 12th day of February, 1982.

Respectfully submitted,

EIBERGER, STACY & SMITH

By /s/

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Attorneys for Defendants

CERTIFICATE OF HAND DELIVERY

The undersigned hereby certifies that on this 12th day of February, 1982, a true and correct copy of the foregoing CONSOLIDATED MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR MORE DEFINITE STATEMENT has been hand delivered to the following:

David L. Smith, Esq.
2036 Dexter Street
Denver, Colorado 80207

William Levis
Assistant Attorney General
Human Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

/s/ Perry L. Goorman